Supreme Court, U. S.
FILED
JUL 12 1976
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-35

FRANK DU BOIS CHEW, SR. and
FRANK HARRY CHEW, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 12, 1976.

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Opinion Below

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on April 28, 1976. A timely petition for rehearing was denied on June 9, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Was the defendant deprived of his Sixth Amendment right to counsel when the Ninth Circuit applied a "farce and mockery standard" of assessing competency, in conflict with the "reasonably effective assistance of counsel" standard adhered to by other circuits of the United States Court of Appeals?

2. Where there is a decision which represents a radical departure from previous

law, which concededly has retroactive application to a case pending on appeal, does it violate the due process and equal protection clauses of the United States Constitution not to remand the appellate case to the trial court for determination of whether facts not developed at trial make the new decision applicable?

3. Under United States v. Demma, 523 F.2d 981 (9th Cir. 1975), does it violate the due process and equal protection clauses of the United States Constitution to require evidence of resistance to a criminal design as a precondition to the entrapment defense where the defendants assert that they have no guilty mens rea?

Constitutional and Statutory Provisions Involved

The relevant constitutional provisions and statutes are as follows:

1. U.S. Const. amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. U.S. Const. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. U.S. Const. amend. XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . ."

4. 18 U.S.C. § 371:

"Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not

exceed the maximum punishment provided for such misdemeanor."

5. 18 U.S.C. § 1343:

"Fraud by wire, radio, or television. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

6. 18 U.S.C. § 2314:

"Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or pro-

mises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof -

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious

representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

Statement of the Case

The government's principal witness was Bruce Cooper, an English immigrant and convicted felon, who acknowledged that he had worked as an informant for various law enforcement agencies over a period of more than twelve years (T. 20-21, 648, 667). For this case the F.B.I. had paid Cooper between $900 and $1,100 "more or less" on the basis of the value of the information Cooper supplied (T. 623-24, 631).

Cooper's testimony and the balance of the government's case, taken in the light most favorable to the government, established that Cooper was contacted by Renouf and White, two English criminals (T. 25,

39), seeking Cooper's assistance in enlisting an American participant in a scheme the two men had devised. The scheme was to obtain a loan secured by bogus bills of lading for platinum to be shipped by sea from England to the United States. To perpetrate the fraud, the two men created various imitation shipping documents, certificates, and insurance documents. Instead of platinum, two cases of nails were shipped (T. 359), and the bills of lading were altered to describe this metal as platinum (T. 30).

Frank Chew, Jr. testified that he was approached by Cooper on behalf of White and Renouf about the possible purchase of a patent for a smelter smoke arrester which his father had developed (T. 674). There were transatlantic telephone conversations, then Renouf and White flew to the United States, where a transaction evolved in

which the Chews sold White and Renouf Europeon rights to the smoke arrester in exchange for the bills of lading.

After the Englishmen arrived in the United States, the Chews made a series of attempts to borrow money using the bills of lading, but they met with no success. According to Cooper, the attempts were in criminal complicity with White and Renouf. According to the testimony of the two defendants, although they transported altered securities in interstate commerce and committed acts which furthered the scheme to defraud, they themselves believed that platinum had been shipped and therefore lacked guilty mens rea. In the end, White and Renouf returned to England after the defendants had paid $1,900 to Cooper for their expenses (T. 708-09); the Chews alone were indicted.

Trial concluded on April 16, 1975,

and the defendants' trial counsel, Merrill W. Robbins, resigned in lieu of disbarment from the Arizona State Bar effective August 1, 1975 (Appellants' Opening Brief, Appendix). Robbins failed to file a motion for new trial and failed to object to evidence of irrelevant bad acts (T. 250, 253-54, 266, 310, 661). As the Court of Appeals found, defense counsel, despite contrary representations, failed completely to pursue questioning of F.B.I. Agent Gwinn about Cooper's motivation and bias (Appendix, p. 5a).

On appeal, the defendants conceded that the multiple failings of Mr. Robbins did not reduce their trial to a "farce or mockery," but urged the Court to reverse the convictions because they had not been furnished "reasonably effective assistance of counsel." The Ninth Circuit declined to adopt the "reasonably effective assis-

tance" standard, as evidenced by its adherence to Hayward v. Stone, 527 F.2d 256 (9th Cir. 1975). (See Appendix, p. 6a).

The case was on appeal at the time the Ninth Circuit announced its decision in United States v. Demma, 523 F.2d 981 (9th Cir. 1975), which holds that an admission of guilt is no longer a prerequisite to pleading the entrapment defense. The Court held that the defendants were entitled to consideration under Demma, but that the facts of the case did not bring the two defendants the benefit of the new decision:

> "An exhaustive reading of the transcript of the trial of the two Chews fails to reveal evidence of persuasion or inducement necessary in this case to draw the defendants into the commission of the acts charged. . . . ."
> (Appendix, p. 3a).

In their petition for rehearing, the defendants asked that their case be reman-

ded to the trial court for a determination of whether there was evidence available which would support an entrapment instruction under Demma. The motion was denied.

Reasons for Granting the Writ

I. There is a Split in the Circuits Over the Appropriate Standard of Competency of Counsel Under the Sixth Amendment.

In recent years, the First, Fifth, and Sixth Circuits have adopted a test of "reasonably effective assistance" to determine whether a defendant's right to counsel has been properly fulfilled. Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). In this case, by its reliance upon Hayward v. Stone, supra, the Ninth Circuit has reaffirmed its adherence, with other circuits to the traditional "farce and mockery" standard. There thus exists

an active controversy between the circuits on the appropriate means of evaluating a crucial Sixth Amendment right. The question is ripe for resolution by this Court.

II. The Question of Whether There Should be a Remand for a Factual Determination of the Applicability of Demma, Raises a Significant Due Process and Equal Protection Problem.

In United States v. Demma, supra, the court below held en banc that an admission of guilt no longer be a prerequisite for raising the entrapment defense. The rationale for the court's decision was that an individual could be entrapped into the actus reas of a criminal offense without possessing guilty mens rea. See Groot, The Serpent Beguiled Me and I (Without Scienter) Did Eat--Denial of Crime and the Entrapment Defense, U. Ill. Law Forum 254 (1973). The Demma court held that as a

prerequisite for the giving of an entrapment instruction, the requirement remained that there be affirmative evidence of lack of predisposition prior to the inducement to commit the crime. Demma, supra, at 984.

In this case, the Ninth Circuit Court of Appeals found that Demma was applicable, but held that there was insufficient evidence of lack of predisposition to require the giving of an entrapment instruction. The court denied the defendants' petition for rehearing which asked that the case be remanded for a factual determination on the issue of predisposition.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). It can only occur if the defendant possesses "an understanding of the law in relation to the facts,"

McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed 2d 418 (1969). The Demma decision, which was rendered after the defendants' trial, was without federal precedent. The defendants therefore cannot be charged with a knowing and intelligent waiver of their right to assert a Demma entrapment defense. Meadows v. United States, 420 F.2d 795 (9th Cir. 1969), cert. denied, 402 U.S. 948, 91 S. Ct. 1607, 29 L. Ed. 2d 118 (1971); United States v. Ingman, 426 F.2d 973 (9th Cir. 1970). Under such circumstances, it is not reasonable to expect that the defendants would have attempted to develop existing, specific evidence of lack of predisposition, nor that the court would have permitted such questioning. Where a new principle of law is announced and there is any question concerning how it should apply to the record below, the proper action is to

remand the matter to the trial court for a factual determination so that there will be a fair and complete record. See cf. Goldberg v. United States, 44 U.S.L.W. 1153 (U.S. Mar 30, 1976).

III. Due Process and Equal Protection Cannot Permit a Requirement That There be an Affirmative Showing of Lack of Predisposition as a Prerequisite for an Entrapment Instruction Under Demma.

Under pre-Demma entrapment law, the requirement of evidence of lack of predisposition made sense. The defense required a moral struggle. It required that a man predisposed to do good be persuaded by a government agent to overcome his scruples and commit a crime. But the entrapment defense after Demma does not necessarily involve moral struggle. Where defendants, like the Chews, assert that they lack guilty knowledge, they cannot logically

be expected to undergo a moral struggle before committing an act which they do not believe to be criminal. Demma's abolishment of the prerequisite admission of guilt carries with it an unavoidable abolishment of the predisposition test.

Consider two hypothetical situations in which the defendants admit the actus reas of a business related crime, but deny guilty scienter. In one instance, the government agent offers an apparently legitimate business opportunity with a reasonable prospect for good profits. Without hesitation, the businessman-defendant enters the transaction, thereby committing the actus reas of a crime. The entrapment defense is unavailable. In a second example, the government agent suggests a business transaction which appears equally innocent to a potential defendant, but in this instance the defendant has some hesitation

about entering the transaction based upon some unrelated business or personal concern (such as conflicting production deadlines or a planned vacation). Despite this initial, slight reservation, the government agent persuades defendant to enter the transaction. In this instance, according to the court below, an entrapment instruction would be appropriate.

In the end, whether or not the entrapment defense would be available where the defendant denies mens rea would thus depend upon trivial business and personal concerns, totally unrelated to the legitimate concern of the criminal law. In one instance, a man is not to receive the benefit of the entrapment defense because he entered an apparently innocent transaction without any reservation or hesitation. In the other, the entrapment defense will be available due to some hesitation based

not upon moral qualm, but upon a business or personal consideration. Under the law of this case, then, the availability of the entrapment defense becomes contingent upon happenstance.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

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Counsel for Petitioners

July, 1976.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appelle,	)	NO.
	)	75-2025
v.	)	
	)	MEMORANDUM
FRANK DU BOIS CHEW,	)	
FRANK HARRY CHEW, JR.,	)	
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the District of Arizona

Before: WRIGHT and SNEED, Circuit Judges, and WILLIAMS*, District Judge

Frank D. Chew, Sr., and Frank H. Chew, Jr., appeal from convictions of all four counts of a four count indictment charging conspiracy to commit an offense

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*Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

against the United States, use of wire communication in foreign commerce to execute a scheme to defraud and the transportation in foreign commerce of forged securities in violation of 18 U.S.C. §§ 371, 1343, 2314.

We affirm.

Both Chew, Sr., and Chew, Jr., contend that the recent decision in United States v. Demma, 523 F.2d 981 (9th Cir. 1975) (en banc), entitles them to a new trial with an instruction to the jury on entrapment. No objections were made to the instructions given by the court and no instruction on entrapment was requested.

Demma does not modify the decisions in this circuit on the sufficiency of the evidence required to charge the jury on the issue of entrapment. 523 F.2d at 984 n.4. As this circuit has held, a material question of fact on the issue of entrapment is sufficient to require the instruction. United States v. Payseur, 501 F.2d 966, 971 (9th Cir. 1974). But this does

not mean a mere scintilla of evidence is sufficient:

> The slight testimony which we have held allows the issue of entrapment to go to the jury must still constitute some evidence of inducement or persuasion by the Government. (United States v. Christopher, 488 F.2d 849, 850-851 (9th Cir. 1973).)

An exhaustive reading of the transcript of the trial of the two Chews fails to reveal evidence of persuasion or inducement necessary in this case to draw the defendants into the commission of the acts charged. The informant Cooper testified to initial contacts with the Chews, whom he previously knew; Chew, Jr. had met co-conspirators Renouf and White previously and apparently was ready and willing to meet with them to consummate the scheme. The only suggestion that the Chews did not instigate this crime and were inveigled into committing these acts is in the final

argument to the jury by their counsel. But there is no evidence or testimony which would indicate any reluctance to participate on the part of the Chews nor any need for persuasion on the part of the informant Cooper.

Appellants further argue that Cooper's role in the crime[1/] was that of instigator, and that this amounts to entrapment. "Instigation is distinguishable from providing a favorable opportunity to break the law to one already and willing to do so." United States v. Demma, 523 F.2d 981, 984 n.3 (9th Cir. 1975). However, the facts and the testimony adduced at the Chews' trial show no more than the provision of a favorable opportunity to participate in

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1/ Cooper testified that he received a phone call from Renouf in London, with White on a second extension, in which Cooper was asked to put Renouf and White in contact with someone in the United States. Cooper thereafter apparently introduced Frank Chew, Jr., to Renouf and White.

the scheme which the co-conspirators had devised.

The Chews raise a number of other grounds for a new trial. They claim their attorney was not permitted to impeach Cooper's testimony by asking questions of special FBI agent Gwinn about Cooper's motivation and bias. See Hughes v. United States, 427 F.2d 66, 68 (9th Cir. 1970). However, the record before us shows that defendants' counsel was not prevented from questioning agent Gwinn, but that he apparently conceded the objection. (Reporter's Transcript 625-628.)

They also claim that the admission of the prior bad acts of co-conspirator Renouf in depositing bogus checks in various bank accounts to create activity in those accounts was prejudicial. Such action could well have been in furtherance of the scheme to defraud and their

admission was well within the proper discretion of the trial judge.

Frank Chew, Sr. individually argues that the evidence in the case is not adequate to support his conviction. There were references in the record to statements by Frank Chew, Jr., and to conversations between the Chews and Renouf, White and Cooper from which a jury could properly find that Frank Chew, Sr. knew that fraudulent bills of lading would be coming from England with Renouf and Cooper.

Finally, we find nothing in the record which indicates appellants were denied reasonably effective assistance of counsel. Hayward v. Stone, 527 F.2d 256, 257 (9th Cir. 1975).

The convictions are affirmed.

Supreme Court, U. S.
FILED
OCT 29 1976
MICHAEL RODAK, JR., CLERK

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported. The court's order of affirmance is reported at 534 F. 2d 334.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1976. A petition for rehearing was denied on June 9, 1976. The petition for a writ of certiorari was filed on July 12, 1976, and therefore is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners received effective assistance of counsel at trial.

2. Whether the defense of entrapment was fairly raised by the evidence.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted on four counts charging: (a) conspiracy to transport forged securities in foreign commerce and commit wire fraud (Count 1); and (b) the completed substantive offenses (Counts 2-4), in violation of 18 U.S.C. 371, 2314, and 1343. Both petitioners were sentenced to concurrent terms of imprisonment for three years. The court of appeals affirmed (Pet. App.).

1. The government's evidence showed that in June 1973 Bruce Cooper, a resident of Scottsdale, Arizona, received a telephone call from Garrett Renouf, an acquaintance in London, England. Renouf informed Cooper that a group of individuals in London, including co-defendants Renouf and William White, had obtained control of a shipping company for the purpose of passing fraudulent bills of lading in foreign commerce (Tr. 21-24).[1] Cooper, a government informant, was asked to locate individuals in the United States who might be interested in participating in the scheme. Cooper related the conversation to petitioner Chew, Jr., who remarked that he would consult with his father (Tr. 25-26). A few days later Chew, Jr. was in Cooper's office in Phoenix when Renouf called again. Chew, Jr. and Renouf spoke at length, eventually agreeing upon a plan whereby Renouf would ship to Los Angeles, California, containers of an inexpensive metal, which would be depicted on altered bills of lading as platinum. The slowest form of transportation possible was

[1]We are lodging with the Clerk of this Court the five-volume transcript of the trial proceedings.

to be employed in order to provide ample time for the English conspirators to fly to the United States and, before the shipment arrived, obtain a large amount of money from a lender, using the altered bills of lading as security.

In August 1973, the conspirators in London created two sham enterprises, Peter Van Eck and Company and McNeil Shipping Company (Tr. 58). Thereafter, they arranged for a shipment by boat of two crates of nails to Los Angeles, California. The shipping documents indicated that Peter Van Eck was the consignor and Chew, Sr. the consignee. The shipment left London on September 7, 1973 (Tr. 34, 291-295, 308, 331-333).

On September 13, while the shipment was on the high seas, Renouf and White flew to Arizona with shipping documents that had been altered to describe the shipment as platinum (Tr. 39, 409). At a meeting in Phoenix, attended by the Englishmen, the Chews and Cooper, White displayed two sets of shipping documents, each for one of the crates in transit (Tr. 43). The parties agreed that a contract would be prepared, reflecting transfer of the platinum by Renouf in exchange for the foreign licensing rights to a smoke arrestor device which Chew, Sr. had invented and patented. Renouf produced a diplomatic passport containing his picture but no name. He inscribed the name "Robert Stewart" on the passport, and indicated that he would use that name thereafter. The contract with Chew, Sr. was drawn up with "Stewart" listed as the other party to the transaction (Tr. 44-45).

Petitioners then set about seeking prospective lenders. Three separate sources were pursued; none was successful.

a. One proposed transaction had its origin when Chew, Sr., asked an acquaintance, Charles Dyer, whether he

knew anyone who might lend him approximately one million dollars with a platinum shipment as collateral (Tr. 45, 91-98). Dyer made several inquiries displaying photocopies of shipping documents which Chew, Sr. had provided. Brokers contacted by Dyer expressed some concern about the absence of certain information on the documents. Nevertheless, Dyer's inquiries led to the discovery of a prospective lender, Charles Peick. On September 27, 1973, a meeting was held in Peick's office in El Cerrito, California. Among those in attendance were Chew, Sr. and Renouf (using the alias "Stewart"). A tentative agreement was reached there for a loan of $1,500,000 secured by the platinum. However, Peick made several demands that proved unacceptable to Chew Sr., and Renouf. Among other things he insisted that the platinum by assayed and that the borrowers pay $5,000 to offset initial expenses (Tr. 227-230).

On September 28, 1973, Chew, Sr. and Renouf proceeded to the Los Angeles docks where they asked Sandra Marlowe, a customs broker, about the shipment, which had just arrived (Tr. 369-370). Chew, Sr. and Renouf discussed with Miss Marlowe terms for storing the two crates, which Chew, Sr. said contained platinum ingots (Tr. 374). Because it was late Friday afternoon, no action could be taken regarding the shipment; Chew, Sr. and Renouf agreed to contact Miss Marlowe the following Monday, October 1 (Tr. 371, 382). Chew, Sr. gave Miss Marlowe Bruce Cooper's business card, indicating that he and Renouf could be reached at the telephone number on the card. Neither Chew, Sr. nor Renouf contacted Miss Marlowe on October 1 (Tr. 382-383). A few days later Renouf and White flew back to England with the original shipping documents and did not return to the United States thereafter.

b. Albert Stout, a Phoenix real estate salesman, was told by Chew, Jr. that he was looking for a loan to be secured by a quantity of platinum (Tr. 416). Stout passed this information to his acquaintances and, as a result, brought together Chew, Jr. and John C. Jeffers (Tr. 417). At a meeting in November 1973 attended by both petitioners, Stout, and Jeffers, the loan proposal was discussed at length. Chew, Sr. stated that the platinum was acquired as payment for certain patents, in lieu of cash, which could not be removed from England (Tr. 428-430). Chew, Sr. displayed his copies of the altered shipping documents. Chew, Jr. told the others that he had known the assignees of the patents in England and had taken part in setting up the assignment transaction (Tr. 431).

The parties met again in January 1974 to discuss a plan by Jeffers to move the platinum to Zurich, Switzerland, for storage. Jeffers had sent an agent to Zurich to prepare for the transaction (Tr. 435-436). Although Jeffers and the Chews discussed the project almost daily thereafter, they reached no binding agreement. In the meantime, Chew, Jr. proposed the loan transaction with Melvin Bangle, an associate of Jeffers. In February 1974 the Chews signed an agreement naming Bangle and Jeffers as exclusive agents for the loan for a period of time (Tr. 504-505). Bangle and Jeffers expected Chew, Sr. to notify Renouf and White (who still had the original copies of the shipping invoices) to return to the United States to complete the transaction. On numerous occasions Bangle and Jeffers asked when the Englishmen would arrive; each time petitioners furnished an excuse for the Englishmen's failure to travel immediately to the United States (Tr. 507).

c. Contemporaneous with the dealings with Jeffers and Bangle, Chew, Jr. negotiated with John Brennan

for the sale of the platinum. Chew, Jr. displayed copies of the shipping documents and insurance forms to Brennan (Tr. 541-543). He told Brennan that his father had seen the platinum and had described their appearance as two-kilogram bars (Tr. 544). These two drew up an exclusive agency agreement (Tr. 551).

2. Because Chew, Sr., the named consignee, had not cleared the shipment within ten days of arrival, as required by customs regulation, a customs agent took control of the crates. Upon opening them, he discovered that they contained common nails (Tr. 358-359). A laboratory analysis confirmed that the nails were not made of platinum (Tr. 362-363). On March 28, 1974, FBI agent Barry Gwinn advised Chew, Sr. of the discovery of the nails and results of the laboratory test. Gwinn asked Chew, Sr. whether he clearly understood the nature of the shipment; Chew, Sr. replied that he would not file a formal complaint with the customs service but would examine the possibility of suing the insurance company to recover the value of the shipment (Tr. 474). That same afternoon Chew, Sr. met with Jeffers and continued his negotiations for a loan. The parties met regularly for weeks afterward; Chew, Sr. never informed Jeffers or Bangle that there was no platinum in the crates (Tr. 447-449). Nor did the Chews inform Brennan of the agent's discoveries while they continued deliberations for what Brennan believed to be a purchase of platinum (Tr. 560-562).

3. In their defense, petitioners summoned two witnesses who testified to the potential value of the process that Chew, Sr. had patented, which had been held out as the basis for his receipt of a quantity of platinum in payment for licensing privileges abroad (Tr. 599-607, 738-743). Both petitioners took the witness stand and, in essence, avowed that they were unaware of any

fraudulent conduct in the course of what they believed to be a lawful business transaction. Chew, Jr. denied discussing any subterfuges with Cooper or Renouf (Tr. 682); Chew, Sr. denied knowledge of either Renouf's true name or the fraudulent nature of the shipping documents (Tr. 787-791). In explanation for continued dealings with prospective buyers and lenders even after the FBI agent's interview, petitioners stated that they had made no affirmative attempts to complete deals for the shipment and that both Brennan and Bangle had persisted in efforts to negotiate (Tr. 701, 784). Chew, Jr. stated further that after Bangle was interviewed by Agent Gwinn, Bangle had telephoned to report that he had made an independent inquiry and had discovered that the shipment of platinum actually existed (Tr. 701).

ARGUMENT

1. The court of appeals rejected petitioners' claim of inadequate representation, by citing (Pet. App. 6a) its prior decision in *Hayward* v. *Stone*, 527 F. 2d 256 (C.A. 9), which held that representation will not be deemed constitutionally inadequate unless it is so poor as to reduce the trial to a farce and mockery of justice. As petitioners note (Pet. 13), several circuits have recently discarded the "farce and mockery" test. *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.); *West* v. *Louisiana*, 478 F. 2d 1026 (C.A. 5). Cf. *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333, n. 2 (C.A. 2). In its place, these courts have adopted a standard of "reasonableness" that they consider to be less stringent. Petitioners urge this Court to determine the appropriate standard. But even if the existing difference among the circuits otherwise constitutes a significant conflict concerning the constitutional minimum, their representa-

tion at their lengthy trial was competent and constitutionally adequate. Cf. *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003.

Petitioners' claim of inadequate representation is based on their counsel's failures to object to evidence of acts of misconduct not charged, to cross-examine Agent Gwinn regarding Cooper's bias, and to seek a new trial (Pet. 11). But each of those "failures" represents a tactical decision based upon the trial situation and the nature of the evidence. The evidence of uncharged acts related largely to Renouf. Since the acts were not criminal, and thus the evidence not significantly prejudicial, an objection would probably have been denied (see Tr. 250, 253-254, 266, 310, 661). Cooper's status was fully disclosed to the jury, so that cross-examination of Agent Gwinn concerning Cooper's cooperation with the F.B.I. was unnecessary (Tr. 623-624, 631). Counsel's trial decisions concerning those matters were thus well within the standard of reasonableness. Moreover, petitioners suggest no substantial basis for a motion for a new trial. See also p. 9, *infra*. Thus the Fifth Circuit's observation in a similar case (*United States* v. *Hand*, 497 F. 2d 929, 935, affirmed on rehearing *en banc*, 516 F. 2d 472, certiorari denied, March 8, 1976, No. 75-621, is pertinent here as well:

> Nothing is advanced which may not be viewed either as a legitimate tactical choice, the relinquishment of an untenable position or, at worst, an honest mistake. We take occasion to reiterate both that we do not view such roundings on trial counsel with favor and that there is a wide expanse of tolerance for ability of counsel between success in the case and an inadequacy so extreme and so clear as to offend the Constitution.

2. Several months after petitioners' trial the Ninth Circuit, sitting *en banc*, resolved an intra-circuit conflict by ruling that a defendant could allege at trial—albeit inconsistently—both that he had not committed the acts charged and that he had been entrapped. *United States* v. *Demma*, 523 F. 2d 981. On appeal of their convictions, petitioners contended that, in light of the ruling in *Demma*, they were entitled to a new trial and an instruction on the defense of entrapment. The court of appeals rejected this argument on the ground that there was insufficient evidence in the record to warrant an entrapment instruction.

As the court correctly noted, "[a]n exhaustive reading of the transcript of the trial" (Pet. App. 3a) disclosed that "[t]he only suggestion that the Chews did not instigate this crime and were inveigled into committing these acts is in the final argument to the jury by their counsel" (*id.* at 3a-4a). The Ninth Circuit's resolution of its own previously inconsistent rulings on the availability of an entrapment defense therefore had no bearing upon petitioners' case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1976.

DOJ-1976-10